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No. 93-1318

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In the Supreme Court of the United States

OCTOBER TERM, 1994

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

TRANSCON LINES, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents contend that both the ICC's credit regulations and the injunction the agency seeks in this case violate the filed rate doctrine. Resp. Br. 12, 22-25. Relying on Transcon's placement of its credit terms in a filed tariff (Br. 21) and citing (Br. 16) a statement of the Commission that the filed rate doctrine requires a carrier to make efforts to collect credit charges due under its tariff,[1] respondents ar-

[1] See *Ex parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 4 I.C.C.2d 340, 346-347 (1988) ("[T]he 'filed rate' doctrine" would be violated if a carrier failed "affirmatively [to] seek the collection-charge damages due it as provided in the tariff."). That statement recognizes a carrier's obligation to pursue collection charges without discrimination between shippers.

gue that the ICC cannot obtain an injunction against their admitted breach of ICC regulations governing the imposition of collection charges. Respondents' contention that its tariff is paramount over both the statute and the regulations in that manner rests on a misunderstanding of the credit regulations, the purpose and effect of the ICC's requested injunction, and the scope and limitations of the filed rate doctrine. The filed rate doctrine does not preclude the ICC from exercising its statutory authority to obtain an injunction enforcing requirements under the Interstate Commerce Act and its implementing regulations, including the Commission's expressly authorized credit regulations.

1. *The ICC's credit regulations do not violate the filed rate doctrine.* Respondents repeatedly invoke (Br. 15, 19-20, 22-25, 26) the filed rate doctrine in claiming that they may violate the ICC's credit regulations with impunity. Yet the filed-rate provisions of the Act apply only to a "rate" or "rates" for "transportation or service." 49 U.S.C. 10761 and 10762.[2] The charges at issue in this case are not tariff "rates for transportation." The only charges at issue here are liquidated damages, whose purpose is to compensate the carrier for the costs of collection

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Respondents apparently read that statement as suggesting that, even in the face of the ICC's request for an injunction, carriers are entitled to pursue collection-charge damages without complying with ICC regulations. Resp. Br. 15-16, 41-42. The Commission has never made such a statement.

[2] Sections 10761 and 10762 are the provisions that have given rise to the filed rate doctrine. *Security Services, Inc.* v. *KMart Corp.*, 114 S. Ct. 1702, 1706 (1994), citing *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 127 (1990), and *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993).

from late-paying shippers.[3] While these additional charges are described in Transcon's tariff, as provided by ICC regulations,[4] they are also governed by the additional requirements set forth in the ICC's credit regulations.

Contrary to respondents' claim (Br. 22-25), the credit regulations do not violate the filed rate doctrine.[5] The ICC's credit regulations, promulgated

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[3] Respondents' amicus Lloyd T. Whitaker recognizes this. See Amicus Br. 12 ("The liquidated damages are intended to make carriers whole for all their reasonable collection costs."). The ICC has never sought to enjoin respondents from collecting the "rates for transportation" (49 U.S.C. 10761-10762) that were due within the authorized credit period. Nor has the ICC sought to prevent respondents from collecting interest from any late-paying shippers. See Pet. Br. 17, 27.

[4] The credit regulations permit a carrier, "by tariff rule, [to] assess *reasonable and certain liquidated damages* for all costs incurred in the collection of overdue freight charges," 49 C.F.R. 1320.2(g)(1) (emphasis added). The ICC's regulations also state that one permissible way to measure "reasonable and certain liquidated damages" in a tariff filing

> is to require payment of the full, nondiscounted rate instead of the discounted rate otherwise applicable. *The difference between the discount and the full rate constitutes a carrier's liquidated damages for its collection effort.*

49 C.F.R. 1320.2(g)(1)(ii) (emphasis added). Transcon's tariff implements that provision to the letter. See Pet. Br. 6 n.7.

[5] The credit regulations were promulgated in 1988, see *Ex parte No. MC-1: Regulations for Payment of Rates and Charges—Penalty Charges for Nonpayment*, 4 I.C.C.2d 340 (1988), and respondents did not challenge those regulations within the 60-day time limit under the Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* Nor did the court of appeals hold that the ICC regulations are invalid. In view

pursuant to the express grant of power in Section 10743, are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *United States* v. *Morton*, 467 U.S. 822, 834 (1984) ("Because Congress explicitly delegated authority to construe the statute by regulation, in this case we must give the regulations legislative and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute."); *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977). Respondents do not suggest that the regulations are arbitrary or capricious; their only claim is that they conflict with the filed rate doctrine.

The filed rate doctrine, however, does not constitute the only source of requirements that carriers must meet under the Act. The credit regulations draw on a source of power that is independent of the filed-rate provisions of the Act, and they address a subject matter that is not covered by those provisions. The filed-rate provisions, 49 U.S.C. 10761-10762, address shipping rates; the credit provision, 49 U.S.C. 10743, addresses release of goods without prior payment. In particular, the credit regulations at issue here deal solely with liquidated damages for late payment. That subject is not governed solely, or even principally, by standards that the Act imposes on the filing and collection of shipping rates; rather, the Act expressly

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of the longstanding reliance of the industry on these regulations and respondents' failure to mount a timely challenge, this Court should decline to entertain respondents' collateral attack in this enforcement proceeding. Cf. *Yakus* v. *United States*, 321 U.S. 414, 427-448 (1944). In any event, respondents' claim lacks merit.

makes credit transactions subject to the ICC's regulations.[6]

For that reason, respondents err in contending (Br. 22-23) that the ICC is barred by the filed rate doctrine from requiring carriers to give notice to shippers, above and beyond the constructive notice provided by the tariff, that shippers are exposed to collection charges for late payment. The Act does not itself speak to the issue of whether carriers may be required to give notice to shippers of liquidated damages claims. And, in view of the heavy financial consequences of such claims, the ICC reasonably concluded that the notice required under its credit regulations serves valid purposes for shippers.[7] While shippers are charged with constructive notice of tariff charges, *Security Services, Inc.* v. *KMart Corp.*, 114 S. Ct. 1702, 1710 (1994), the filed rate doctrine does not prevent the ICC from prescribing by regulation

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[6] Section 10743 states that only if the ICC promulgates "regulations * * * governing the payment for transportation and service and preventing discrimination" may a carrier "give up possession at destination of property transported * * * before payment." 49 U.S.C. 10743(b)(1).

[7] In light of the prevailing levels of discount rates in the industry during the relevant time, a loss-of-discount measure of liquidated damages often doubles the original charges. Additional notice of potential charges of that magnitude is plainly reasonable. Also reasonable is the ICC's prohibition against the imposition of loss-of-discount collection charges in aggregate balance due claims. A carrier realizes substantial economies of scale in collecting grouped claims; if a loss-of-discount measure of damages were applied to such groupings, it would reap far more than the carrier's fair compensation for its collection costs.

that liquidated damages claims warrant actual notice as well.[8]

It would be especially inappropriate to apply the filed rate doctrine to invalidate the credit regulations, because the core of that doctrine is that "a shipper cannot avoid payment of the tariff rate by invoking common-law claims and defenses such as ignorance, estoppel, or prior agreement to a different rate." *Reiter* v. *Cooper*, 113 S. Ct. 1213, 1219 (1993); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126 (1990). Respondents' claim (Br. 22) that the credit regulations violate the filed rate doctrine rests on their view that the credit regulations create "a defense to * * * enforcement" of the tariff rate.[9] In fact, the credit regulations do not create defenses that are enforceable at the behest of

[8] Amicus Lloyd T. Whitaker argues (Br. 12) that the "liquidated damages regulation has nothing to do with fixing the conditions under which carriers may extend credit to shippers," and that it is therefore not a credit regulation under Section 10743. But a regulation that addresses the consequences of late payment in a credit transaction *is* a regulation of credit. See, *e.g.*, the Truth in Lending Act, which mandates "a meaningful disclosure of credit terms," 15 U.S.C. 1601(a), and requires a creditor in certain "consumer credit transaction[s]," 15 U.S.C. 1638(a), to disclose, *inter alia*, "[a]ny dollar charge or percentage amount which may be imposed by a creditor solely on account of a late payment, other than a deferral or extension charge." 15 U.S.C. 1638(a)(10).

[9] See Resp. Br. 22 (ICC's regulations make "the carrier's misquotation of the loss-of-discount tariff provision, or the shipper's lack of notice of that tariff provision, a defense to its enforcement"); *ibid.* (ICC's regulations "make the carrier's failure to send bills in separate envelopes, or in a timely manner, a defense to payment of the rate specified in Transcon's loss-of-discount tariff").

shippers. See *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. 336 (1982). The credit regulations are enforceable solely *by the ICC*.

Maislin, the leading case on which respondents rely (Br. 22-25), offers no support to them. *Maislin* holds that the ICC cannot "justify[] deviation from the filed rate purely on the ground that the carrier and shipper have privately negotiated a lower rate." 497 U.S. at 131; *Security Services, Inc.* v. *KMart Corp.*, 114 S. Ct. at 1708 ("We held in *Maislin*, *supra*, that the [filed rate] requirement was not subject to discretionary enforcement when raised against a shipper who had agreed with a carrier to a negotiated rate lower than the rate on file."). The credit regulations at issue here do not make a privately negotiated rate take precedence over a tariff.[10] They simply require that a tariff term providing for liquidated damages must be enforced in light of the ICC's integrated regulatory scheme for conducting transactions on credit.

[10] Nor are the portions of the credit regulations that permit a carrier "wholly outside of its tariff, [to] assess collection charges through contract terms in a bill of lading," 49 C.F.R. 1320.2(g)(3), vulnerable under *Maislin* on the theory that they "sanction[] adherence to unfiled rates." Resp. Br. 23, quoting *Maislin*, 492 U.S. at 132. The bill-of-lading option underscores that the "collection charges" authorized by the ICC's credit regulations are not "rates * * * for transportation" under 49 U.S.C. 10762. But even if the bill-of-lading approach raised questions under *Maislin*, it would not assist respondents. The ICC is not seeking to require respondents to adhere to a bill of lading. Rather, the ICC is seeking to require respondents to adhere to the credit regulations governing the imposition of collection charges "described in [a] tariff rule," 49 C.F.R. 1320.2(g)(2)(i).

The ICC's injunction would leave shippers bound to pay the filed rate for transportation due within the authorized credit period plus interest to compensate for late payment. *Maislin* itself distinguished cases in which, as a remedy for an unreasonable practice, a carrier is required to adhere to a different tariff. 497 U.S. at 129 n.11. This case is even stronger than those cases, because the requirement being enforced is not the general "reasonable practices" requirement, but the specific statutory rule against unauthorized credit transactions.[11] If, as respondents contend, the filed rate doctrine overrode their obligation to comply with those regulations when seeking to enforce liquidated damages claims, a carrier could effectively define its own credit terms through its tariff filings, notwithstanding the statutory prohibition against credit transactions except as authorized by ICC regulations. 49 U.S.C. 10743.

2. *The injunction requested by the ICC does not violate the filed rate doctrine.* Respondents also claim (Br. 26-37) that the injunction sought by the ICC is invalid because it would prevent collection of the filed rate. Respondents appear to recognize (Br. 26-27), as this Court held in *Reiter* v. *Cooper*, *supra*, that "[t]he filed rate doctrine * * * does *not* preclude avoidance of the tariff rate * * * through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself." 113 S. Ct. at

[11] Contrary to respondents' assertion (Br. 41-42), the ICC is not claiming the right to apply some unrelated filed tariff as a remedy for respondents' violations. Rather, the ICC's remedy is precisely tailored to the violations at issue: because respondents have violated specific regulations governing collection of liquidated damages, they may not collect liquidated damages.

1219. They assert, however, that the ICC cannot prevent them from collecting liquidated damages set forth in a tariff, because 49 U.S.C. 10743 and 11702 do not contain "specific statutory language or legislative history that shows a specific congressional intention to create the exception [to the filed rate doctrine]." Resp. Br. 27. Contrary to respondents' claim, the ICC's invocation of its express authority in 49 U.S.C. 11702 to "bring a civil action * * * to enforce" its credit regulations under Section 10743 is sufficient to overcome their reliance on the filed rate doctrine.

a. Respondents first assert (Br. 28-29) that Section 10743 is a "minor grant of authority" and is not a specific exception to the filed rate doctrine. As shown above, however, Section 10743 and the filed-rate provisions of the Act address different subjects. The statute does not subordinate one set of requirements to the other. And, contrary to respondents' suggestion (Br. 29), *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, No. 93-356 (June 17, 1994), does not suggest that filed-rate requirements always prevail over all other forms of statutory authority. That case holds that the provision in the Federal Communications Act authorizing the FCC to "modify any requirement" of the tariff-filing provision of that Act did not authorize the FCC to dispense with tariff filings altogether for certain carriers. *MCI*, slip op. 7-14. That analysis has no bearing on the relationship between the Interstate Commerce Act's filed-rate requirements and its authorization for the ICC to regulate credit transactions.[12]

[12] *MCI* is also irrelevant here, because the applicable ICC regulations do not dispense with tariff filings for loss-of-

Noting that the only specific authority mentioned in Section 10743 is that the ICC may permit "weekly or monthly payment for transportation," [13] respondents argue that the credit regulations are relatively unimportant and cannot override the " 'utterly central' requirements" of the filed rate doctrine. Resp. Br. 28. The Act, however, grants broad authority to the Commission to issue credit regulations "governing the payment for transportation and service," so long as the ICC's regulations "prevent[] discrimination," 49 U.S.C. 10743(b)(1). The ICC's regulations are consistent with that anti-discrimination mandate. A carrier's uniform compliance with the ICC's regulations prevents discrimination, because similarly situated shippers receive the same treatment.[14] When a

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discount liquidated damages. Rather, they treat a tariff filing as one requirement a carrier must meet to impose such damages. Pet. Br. 3-5.

[13] The full sentence states: "The regulations of the Commission may provide for weekly or monthly payment for transportation provided by motor common carriers and for periodic payment for transportation provided by water common carriers." 49 U.S.C. 10743(b)(1). The point of that sentence is to distinguish the Commission's powers with respect to motor carriers and water carriers. There is no suggestion that the sentence defines the boundaries or character of permissible credit regulations.

[14] Amicus Lloyd T. Whitaker errs in suggesting (Br. 8-9) that the Commission's rules in practice foster discrimination because they "impose[] highly technical post-delivery requirements on the motor carriers as conditions to collecting their filed rate penalties." The rules are not highly technical; for example, it is easy for a carrier to provide the requisite notice of late payment. And carriers have no discretion to violate the regulations and favor particular shippers in the imposition of liquidated damages. Any such knowing favoritism would

carrier violates those rules, however, it cannot rely on the anti-discrimination requirement of Section 10743, or the filed rate doctrine, to make an end-run around the ICC's credit regulations.

Amicus International Brotherhood of Teamsters asserts (Br. 7) that "if the Commission's arguments prevail and Transcon's loss of discount provisions are voided, discrimination would occur because all shippers utilizing Transcon's services would receive the discounted rates, regardless of when the freight charges were paid." But shippers who are victims of regulatory violations by Transcon and its bankruptcy trustee (and who have been assessed, years after shipment, with huge loss-of-discount claims) are not similarly situated to shippers who were rebilled in compliance with the regulations. Treating differently situated shippers differently does not result in discrimination. Moreover, to the extent a shipper has not paid the amount originally billed, it will be required to pay that amount with interest. Interest both compensates the carrier for loss of use of its money and ensures that delinquent shippers do not enjoy an advantage over shippers who make timely payment.

The legislative history of the Act does not support respondents' claim (Br. 31-37) that the purpose of Section 10743 was "to facilitate * * * compliance with the filed rate doctrine" (Br. 31). The central purpose of empowering the Commission to regulate credit was to prevent discrimination in credit practices. As this Court explained in *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. at

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expose the carrier to a governmental enforcement action. 49 U.S.C. 11902-11903.

345-346, before 1918, the federal government did not regulate the extension of credit by rail carriers. "Wartime regulation revealed, however, that a general requirement of payment before delivery would protect the working capital of carriers and avoid discrimination among credit recipients." *Id.* at 346. After the end of the war, railroads returned to private control, and Congress prohibited them from releasing freight before payment "except under such rules and regulations as the Commission may from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination." Transportation Act of 1920, ch. 91, § 405, Stat. 479.[15]

In light of that history, respondents err (Br. 31-32) in claiming that the source of the ICC's authority to regulate credit was the 1927 "Newton Amendment." The Newton amendment substituted the phrase "govern the settlement" for the words "assure prompt payment" in the original credit provision, see 44 Stat. 1447 (1927). It responded to the suggestion by shippers that the Commission needed additional authority to expand the credit periods in its then-current rules so that shippers could study their freight bills and compare them with tariff rates. See H.R. Rep. No. 1214, 69th Cong., 1st Sess. 2 (1926); S. Rep. No. 1508, 69th Cong., 2d Sess. 2 (1927). As the Commission explained, "[t]he only change in the law made by the amendment is that now we are not restricted to making rules that assure prompt payment of freight charges." *Ex parte 73: In re Section 3 of Interstate Commerce Act As Amended February 28, 1920, and March 4, 1927*, 171 I.C.C. 268, 270 (1931). The amendment did not change the main purpose of empowering the Commission to regulate credit: to "prevent[] discrimination" against shippers. 49 U.S.C. 10743(b)(1).

[15] Congress's authorization to the Commission to regulate credit was applied to motor carriers when they came under Commission jurisdiction in 1935. See Motor Carrier Act of 1935, ch. 498, § 223, 49 Stat. 565-566.

b. The injunction in this case was sought under 49 U.S.C. 11702. Under *Reiter* v. *Cooper*, that express right of action trumps the filed rate doctrine. Pet. Br. 17-21. Respondents argue (Br. 30-31) that the ICC's authority to seek an injunction is inapplicable in this case because Section 11702 does not extend to enforcement of "a provision of this subtitle governing the reasonableness and discriminatory character of rates." 49 U.S.C. 11702(a)(4). Respondents do not argue that Section 10743, the credit provision, is a provision "governing the reasonableness and discriminatory character of rates." Instead, they suggest that application of Section 11702 in this case would violate the principle that a federal court may not "enjoin tariff rates that the ICC has neither suspended, rejected, nor cancelled." Resp. Br. 30; see *id.* at 34-37.

The ICC's injunction, however, would not suspend, reject, or cancel Transcon's tariff.[16] Indeed, if Transcon were an operating carrier, it would be required in future transactions with shippers to comply both with its tariff terms (see note 1, *supra*) *and* with

[16] Respondents' reliance (Br. 34-37) on *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), is thus misplaced. That case involved a request by a private party for injunctive relief against a change in rates. This case involves a request by the ICC for injunctive relief to enforce credit regulations.

the ICC's credit regulations.[17] The only consequence of the ICC's injunction is to prohibit respondents from enforcing the tariff without complying with the ICC's regulations. Section 11702 expressly authorizes the ICC to seek such an injunction.

c. In *Southern Pacific Transp. Co.* v. *Commercial Metals Co.*, 456 U.S. at 349, this Court stated that the ICC's authority includes the "power to seek a federal-court injunction requiring a carrier to comply with the [ICC's credit] regulations." Despite this language, respondents contend (Br. 37-39) that *Commercial Metals* mandates the denial of an ICC-requested injunction that would prevent a carrier from enforcing a tariff term. *Commercial Metals* held that *a shipper* may not raise a credit-regulation violation to defend against the carrier's effort to collect the filed rate. 456 U.S. at 352. An integral part of the Court's reasoning was that the ICC possessed adequate remedial authority to require adherence to the credit regulations, including the power to seek an injunction. *Id.* at 349, 352; Pet. Br. 15-16. *Commercial Metals* thus holds that the ICC may invoke its authority to compel adherence to the credit regulations, even though shippers may not. Where, as here, the ICC does not seek to enjoin collection of rates for transportation, but only a carrier's claim to collect liquidated damages for late payment in violation of the ICC's regulations, *Commercial Metals* clearly supports the ICC's action.

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[17] The tariff on its face is not illegal. Contrary to respondents' suggestion (Br. 39-41), however, the ICC could strike a tariff term if there were evidence that a carrier were engaged in serious violations of the Act in enforcing that tariff term. See *ICC* v. *American Trucking Ass'ns*, 467 U.S. 354 (1984) (the ICC may strike a facially valid tariff, even retroactively in some circumstances, based on conduct related to the tariff that violates other provisions of the Act).

3. *The ICC's injunction is necessary to enforce the credit regulations.* If the ICC were not entitled to obtain the requested injunction in this case, respondents would effectively be immune from any regulatory action for their violations. Respondents claim (Br. 45-46) that the ICC may obtain prospective injunctions, or may prospectively cancel all loss-of-discount tariffs. Those remedies, however, would have no impact at all on nonoperating carriers such as Transcon and its bankruptcy trustees. Respondents also suggest (Br. 45) that a shipper could request a referral to the ICC to determine reparations "to the extent that a carrier's loss-of-discount provision is unlawful." But Transcon's tariff is not unlawful. Rather, the unlawful act is respondents' pattern of violating the ICC's credit regulations governing liquidated damages claims.

Respondents note (Br. 25) that Section 11916 of the Interstate Commerce Act makes the filed rate "conclusive proof" of the "legal rate" in specified civil or criminal enforcement proceedings (see 49 U.S.C. 11902-11903) brought by the government to enforce the anti-rebate provisions of the Act. 49 U.S.C. 11916.[18] According to respondents, Section 11916 thus requires them to collect the non-discount rate in this case, while the ICC "under its credit regulations, wants to take the position that Transcon

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[18] That provision states: "When a carrier files with the Interstate Commerce Commission or publishes a particular rate under chapter 107 of this title or participates in one of those rates, the published or filed rate is conclusive proof against that carrier, its officers, and agents that it is the legal rate for that transportation or service in a proceeding begun under section 11902 or 11903 of this title. A departure, or offer to depart, from that rate is a violation of those sections." 49 U.S.C. 11916.

has a legal duty to refrain from collecting that filed rate." Br. 25.

That contention turns the Act on its head. Section 11916, by its terms, applies only to actions by the government to enforce the anti-rebate provisions of the Act, 49 U.S.C. 11902-11903. To the extent that shippers failed to make timely payment, respondents were obligated to impose Transcon's loss-of-discount penalty *within the framework of the ICC's rules*. Having failed to do so, respondents are exposed to the remedies at the agency's disposal for violating ICC regulations. If respondents desired guidance concerning whether, notwithstanding their violation of those regulations, they were entitled to collect liquidated damages from late-paying shippers, their remedy was to institute an appropriate proceeding before the Commission. See 49 U.S.C. 11701; 49 C.F.R. 1117.1. The dilemma that respondents now claim to face is entirely of their own making; it does not justify denial to the ICC of its explicit power to enforce the requirements of the Act and its implementing regulations through an injunction. 49 U.S.C. 11702.

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For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 1994

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